**U.S. Department of Labor**

**Board of Alien Labor Certification Appeals**
**800 K Street, NW, Suite 400-N**
**Washington, D.C. 20001-8002**

Date: April 28, 1998

Case No.: 97 INA 255

In the Matter of

**FOUNTAIN TECHNOLOGIES, INC.,**
Employer

in behalf of

**CHINGFEN YU,**
Alien

Appearance: R. W. Freeman, Esq., of New York, New York

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

# DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of CHINGFEN YU, ("Alien") by FOUNTAIN TECHNOLOGIES, INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

*Statutory Authority*. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

## STATEMENT OF THE CASE

On August 8, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Accountant" in the Employer's firm, which was engaged in the business of importing, marketing, and distributing computer parts throughout the United States and the Far East. AF 05, 58. The position was classified as an "Accountant, Systems," under DOT Occupational Code No. 160.167-026.[2] The Employer described the job duties as follows:

> Devise & implement accounting system using computerized FoxPro database & auditing; collect financial data & compile accounting records; prepare government tax reports & monthly financial statements; review & prepare financial information; prepare periodic sales & financial reports in Chinese & English for management decision-making & government compliance.

AF 05 at Item 13. The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was college graduation with a Master of Science or Master of Business Administration degree in Accounting or Finance. The experience requirement was one year in the Job Offered or two years in the Related Occupation of Teaching Assistant. The Other Special Requirements were (1) that the related experience must be in the field of Accounting and must include use of DBASE III Plus or FoxPro for Accounting and (2) that the worker "[m]ust be able to speak, read, and write Mandarin (Chinese) and be conversant in Taiwanese (Chinese)." AF 05, at Items 14 and 15.[3]

The Alien, a national of Taiwan in the Republic of China, graduated from a Taiwanese university, where he earned a baccalaureate degree in Accounting in 1989. He attended St. John's University in New York, where he earned the degree of Master of Business Administration in 1994. The Alien can speak, read and write in Mandarin (Chinese) and is conversant in Taiwanese (Chinese). The Alien worked as a Teaching Assistant in Soochow University in Taipei from 1989 to 1991. On June 1994 the Alien was hired as an accountant in a jewelry store in New York, where he worked until November 1994, when the Employer employed him as Accountant, a position in which he was working at the time this application was filed. AF 02-03. No U. S. job applicants responded after this position was advertised and posted, and no qualified candidates

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]The hours were 9:00 to 5:00 in a forty hour week at $32,205 per year.

were found in the job bank after this position was advertised and posted. AF 25-35.

**Notice of Findings**. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated July 17, 1996. AF 37-40. (1) Citing 20 CFR §§ 656.21(b)(2) and 656.21(b)(2)(i), the CO found that the Employer had failed to offer sufficient evidence to justify its special job requirement of fluency in the Chinese language. AF 37-40.[4] (2) Citing 20 CFR §§ 656.21(b)(2) the CO said the requirement for a Master of Science or Master of Business Administration degree was restrictive, observing that provision for a baccalaureate degree plus added years of experience should be included in lieu of a Master's degree for such graduate studies. In addition, the CO found that the Related Occupation of Teaching Assistant as the only alternative qualifying criterion was restrictive and that employment as an Accountant also should have been included for this purpose. The CO then stated the documentation necessary to address and rebut this issue. (3) The CO found that the requirement of a foreign language was not supported by proof of its business necessity. The CO then said the Employer could delete the Chinese language requirement or prove its business necessity under 20 CFR § 656.21(b)(2)(i). Explaining that the Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform the job in a reasonable manner, the CO itemized the specific facts that the Employer was directed to document to prove the business necessity of fluency in the Chinese language in this case. AF 37-38.

**Rebuttal**. The Employer's August 21, 1996, rebuttal addressed the issues stated in the NOF. AF 41-59. The Employer first explained its need that the employee be qualified with an advanced degree in accounting or business administration, and it agreed to add the work of Accountant as a Related Occupation and readvertise the position. Addressing the foreign language requirement, the Employer then said its operations are focused in the United States and the Far East, adding that "the bulk of the financial documentation communicated between our headquarters in the United States and our branches and agencies in Taiwan, China, and Hong Kong must be transmitted in Chinese to be properly comprehended by the necessary officials." The Employer argued emphatically that, "Absolute precision and accuracy in the collection of sales data and accounting information for the calculation of periodic sales reports and the preparation of financial statements is needed from our Accountants." Because of the need to be in communication with Employer's Taiwan offices, Employer contended that the employee must be able to speak, read, and write Chinese in the Mandarin dialect and to engage in conversations in the Taiwanese dialect.

In support of this requirement, the Employer asserted that it conducts ten per cent of its business in Taiwan, where both dialects are predominantly spoken as separate languages. Referring to its "New Jersey headquarters" and its "branch office and agencies in Taiwan, ROC" the Employer the Employer asserted that about seventy per cent of its accounting or managerial

---

[4]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

personnel in Taiwan do not speak English, that seventy percent of this group speaks only Mandarin and thirty percent only speaks Taiwanese, and that ten percent or seventy million dollars of its seven hundred million annual gross volume of business is exclusively dependent on the Employer's Taiwan market. AF 56. The Employer adding that its use of bilingual personnel for some of its accounting positions is an established practice in its operations.

**Final Determination**. The CO denied certification in the Final Determination issued on August 27, 1996. AF 60-62. The CO said that Employer was directed to include a baccalaureate degree plus added experience in lieu of a Master's degree and one year of experience, and it was told to expand the Related Occupation to include the work of an Accountant. Employer failed to amend its educational requirement or to document that the existing educational requirement was normal for this position.[5]

The CO then found that the Employer failed to rebut the finding in the NOF under 20 CFR § 656.21(b)(2) that the position description contained a foreign language requirement that was not supported by proof of business necessity. Observing that the Employer failed to delete its foreign language requirement, the CO noted that it also failed to submit the required evidence that this hiring criterion arose from business necessity, rather than from Employer's convenience. To meet the standards of proving business necessity pursuant to 20 CFR § 656.21(b)(2) the Employer was directed to submit the following proof:

> (1) The total number of people it deals with and the percentage of those people it deals with who cannot communicate in English. (2) The percentage of Employer's business that is dependent upon each of the languages it requires. (3) How the absence of each of those languages would have an adverse impact on the Employer's business. (4) The percentage of time that the worker would use each of the required languages. (5) How Employer had dealt with and handled Mandarin and Taiwanese speaking clients previously or was currently handling this segment of its business. (6) Employer was told to describe the services it provided to other ethnic groups and how it handled the language problem in relation to other groups. (7) Employer was then directed to provide any other proof that would clearly show that fluency in Mandarin and Taiwanese was essential to its business.

---

[5]The Employer appended to its statement a series of six resumes of persons living in New Jersey and New York, some of whom were multilingual in English, Mandarin, and Taiwanese. AF 49-54. The CO said, "Employer's rebuttal provides resumes of past and present employees; however there is no documentation showing whether these employees possessed the Master's degree for this position prior to hire with this employer as directed. We also note that two resumes do not contain the required skills in either DBASE III Plus or FoxPro for accounting." Employer also attached several sheets it described as "Chinese financial documents." AF 41-48. Nothing in either Employer's statement or its attorney's cover letter explained these attachments or connected them to its argument that business necessity requires the person hired for this job to speak, read, and write Chinese in the Mandarin dialect and to engage in conversations in the Taiwanese dialect. At best such pages might have illustrated the nature and content of the Employer's institutional culture, if these were shown to be significant, routine intracorporate memoranda and business communications. As they appear in the record without translation or explanation, however, they merit little consideration.

The CO found that the Employer failed to provide the total number of people with whom it dealt and the percentage of the worker's time that would be spent communicating in each of those languages. AF 60-61. Although it agreed to advertise, the CO said that this would serve no purpose because Employer had failed to delete the restrictive language requirement and to amend the educational requirement. Concluding that the Employer had failed to document its business necessity for its language and educational requirements, the CO denied alien labor certification. AF 60.

**Appeal**. Following the denial of certification, on October 1, 1996, the Employer requested both reconsideration and review of the Final Determination, submitting written arguments by both the Employer and the Alien, together with added evidence in support of various issues. The Employer contended in argument that skills at the level of a Master's degree were required by its size and by the multinational nature of its business. Placing great emphasis on the needs of its Taiwanese market, the Employer reiterated that this represented ten per cent of its business and repeated the arguments in its Rebuttal. The crux of its statement was that the greater insight acquired in the academic studies for this post graduate degree was essential to the performance of this worker's duties, which included making "managerial decisions" on a daily basis. The Employer then repeated the arguments as to the language requirement in its Rebuttal statement. The CO denied reconsideration on grounds that motions for reconsideration will only be entertained with respect to issues that could not have been addressed in the rebuttal, citing **Harry Tancredi**, 88 INA 441(Dec. 1, 1988)(*en banc*).

## Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity.

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) the use of that foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This is demonstrated with proof as to the customers, co-workers, or contractors who speak the foreign language and the percentage of the employer's business that involves that language. In the context of the instant

case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed.[6]

The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. The Employer did not persuade the CO because its argument as to its business necessity for an Accountant fluent in written and spoken Chinese in the Mandarin and Taiwanese dialects turned entirely on assertions of facts that were unsupported by objective evidence. After examining the Appellate File the Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because the documentation is vague and incomplete. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991).

It is also observed that the evidence Employer submitted with its request for review cannot be considered by the Board. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). Upon examination, the evidence of record supports the CO's finding that the Employer failed to prove that fluency in both Mandarin and Taiwanese Chinese was a minimum requirement for the performance of the job duties described in ETA Form 750A. Moreover, sufficient evidence confirms the CO's finding that the Employer did not supply the data that the CO itemized in the NOF and listed *supra* in the Final Determination.

The written statements by the Employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases. The CO is not required to accept as credible or true the written statements Employer has supplied in lieu of independent documentation, but in considering them must give Employer's statements the weight they rationally deserve. The bare assertions that Employer's statements offered without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en*

---

[6] In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because no relationship was proven between the customers' use of the foreign language and the job to be performed.

*banc*).[7]

Although the Employer ostensibly complied with the directions to file evidence supporting its position on the issues the NOF raised in this case, the CO explained that the facts sought were not proven by the Employer's vague assertions in which it offered no specific examples and limited itself to general statements that appeared unconnected with tangible data. Moreover, the proof offered in this case failed to demonstrate a frequent and constant need to communicate in a foreign language in business transactions that was sufficient to affect the performance of the worker's duties as an Accountant. Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*). It follows that the conclusion of the Certifying Officer that the Employer failed to establish that it is not feasible to hire a U. S. worker without the foreign language stated by the job description of its application and the denial of alien labor certification was supported by the evidence of record and should be affirmed.

Accordingly, the following order will enter.

## ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER

[7]To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW**: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.